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No. 91-707

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOHN B. LENNES, JR., COMMISSIONER OF THE DEPARTMENT OF LABOR AND INDUSTRY, STATE OF MINNESOTA,

and

MINNESOTA MECHANICAL CONTRACTORS ASSOCIATION, INC.,

Petitioners,

v.

BOISE CASCADE CORPORATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

INTRODUCTION

The Mechanical Contractors Association of America ("MCAA") seeks leave to file a Brief Amicus Curiae in support of the Petition for a Writ of Certiorari in this proceeding.

MCAA has sought consent to file its brief from the parties in this case. The Petitioners, John B. Lennes,

Jr., Commissioner of the Department of Labor and Industry, State of Minnesota, and the Minnesota Mechanical Contractors Association, Inc. have given their consent. The Respondents, Boise Cascade Corporation, BE&K Construction Company, Charles L. Lee, Relco Unisystems Corporation, Forrest Dahmes, Mid-States Mechanical Services, Inc., and Kristine Southard have not given consent.

MCAA supports the position of the Petitioners in this proceeding and asks that the Court grant certiorari and reverse the decision of the Eighth Circuit.

MCAA'S INTEREST AS AMICUS

MCAA is a membership association comprised of more than 1,300 mechanical contracting firms operating throughout the United States. Its activities include providing top-level training programs for inexperienced workers, in order to assure safety in the construction industry. MCAA is also a joint sponsor, with labor organizations, of apprenticeship programs throughout the country. Its intensive programs combine classroom training with on-the-job training.

MCAA has long been active in promoting job site safety. Many years prior to the enactment of the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 *et seq.*, MCAA established a safety committee which now provides its contractor members with current information on safety programs and regulations and on other programs to promote job-site safety.

Many construction-related businesses in this country are not affiliated with MCAA and do not follow its rigorous safety standards. The actions of some contractors in ignoring or minimizing work place safety have lead to the enactment of federal and state regulations imposing minimum safety requirements for the workplace. These

safety regulations are essential to prevent disastrous accidents that occur all too frequently.*

The Minnesota regulation involved in this case, which established job-site ratios between unlicensed and licensed high pressure pipefitters, is an example of such safety measures. The regulation seeks to maintain a sufficient number of trained and licensed pipefitters at job sites for adequate supervision and safety. Without such a requirement, employers would be free to use untrained, unlicensed, and unsupervised employees to perform extremely hazardous high pressure pipefitting work. Congress certainly did not contemplate that the preemption provision of the Employee Income Retirement and Security Act (ERISA), 29 U.S.C. § 1114, would erode the ability of Minnesota or other states to enact measures directed to workplace safety.

MCAA seeks to file a Brief Amicus Curiae in this matter because it believes that the decision of the Eighth Circuit would have a significant adverse effect on workplace safety. As a joint sponsor and participant in apprenticeship programs throughout the country, MCAA is in a position to furnish the Court material information about the effect of the Minnesota regulation on apprenticeship programs and job-site safety.

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* A contemporary illustration of the high degree of hazard created by industrial accidents occurred in Hamlet, North Carolina, in September, 1991. A fire at a chicken processing plant took the lives of 25 people and injured more than 40 others, as well as caused substantial property damage.

CONCLUSION

For the foregoing reasons, MCAA respectfully requests the Court to grant leave for it to file a Brief Amicus Curiae in this proceeding.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

SUMMARY OF ARGUMENT

The Mechanical Contractors Association of America ("MCAA") supports the position of the Petitioners herein. MCAA respectfully submits this Amicus Brief and requests that the Court grant certiorari and reverse the ruling of the Eighth Circuit Court of Appeals.

The decision of the Court of Appeals, if allowed to stand, may severely impede the efforts of the states to assure safety in construction work. In this particular case, the court's decision precludes Minnesota's requirement that a sufficient number of fully trained, experienced, and licensed workers be present at a job site, and the decision threatens more broadly to impair state-imposed safety requirements. MCAA, in furtherance of its interests in promoting and protecting construction safety, asks that the Court grant certiorari, re-examine the decision of the Court of Appeals, and reverse the ruling below.

MCAA is particularly concerned that the decision of the Court of Appeals will preclude or substantially limit state regulation of the licensing of persons engaged in the construction trades, without compensating federal regulation. The prohibition of this type of safety regulation, and other regulations like it, inevitably will lead to injury, death, and destruction of property from construction accidents. In addition, the decision of the Court of Appeals permits an intrusion on interests traditionally and prudently left to state regulation, contrary to principles of federalism that this Court has established and despite the absence of any Congressional intent, express or implied, to preempt state safety regulations.

ARGUMENT

I. THE INTERESTS AND EXPERIENCE OF AMICUS MCAA

The MCAA traces its beginning to 1889, when seventy heating contractors from thirty-five cities and twenty states formed the Master Steam and Hot Water Fitters National Association. The organization is now comprised of more than 1,300 mechanical contracting firms of all sizes across the country. Members of MCAA install mechanical systems in power plants, hospitals, factories, skyscrapers, and public buildings throughout the United States.

MCAA is a joint sponsor of apprenticeship programs throughout the country. Its rigorous programs combine intensive classroom preparation with on-the-job training.

MCAA has a safety committee whose mandate is the curtailment of the human and economic toll taken by construction accidents. The safety committee provides contractors with up-to-date information on safety programs and regulations and other instructional materials to promote job-site safety.

II. REASONS FOR GRANTING CERTIORARI

The job-site ratio involved in this litigation was properly upheld by the trial court as "an occupational training requirement enacted to protect public safety," in the face of a challenge under the preemption provision of the Employee Retirement and Income Security Act (ERISA), 29 U.S.C. § 1144. The holding by the Court of Appeals that ERISA preempts the job-site ratio rule should be reviewed by this Court for three reasons: (a) it would effectively disable Minnesota (and other states) in the licensing of construction-related workers; (b) it would disrupt the proper balance between federal and state spheres of interest; and (c) it could prevent states from enacting

measures to preserve public safety, thereby endangering workers, the public, and property.

A. Impact on Local Licensing

The states customarily regulate and, in some cases, restrict persons who perform certain phases of construction work. These regulations assume many forms. A number of states (or local units of government) prescribe minimum experience requirements. Some mandate that examinations be passed in order to perform the work. A few, like Minnesota, have established minimum job-site requirements.

These regulations apply throughout the construction industry. They affect not only pipefitters (often referred to as steamfitters), but in various forms, they pertain as well to electricians, plumbers and other persons involved in the building trades. The measures are geared to assuring that persons performing inherently dangerous work are minimally competent to undertake it and that inexperienced workers are properly supervised. Without these regulations, unqualified and inadequately supervised workers could become engaged in hazardous tasks, endangering not only themselves, but also co-workers and the public at large.

The need for continuing comprehensive safety regulation at the local level is quite apparent. In 1989, approximately 20 percent of accidental fatalities in the private sector work force (consisting of 8 industry divisions) occurred in the construction industry, even though construction covered less than 6 percent of the total work force.[1] In 1988, the highest rate of incidence of occupational injury in terms of lost workdays, after that of the mining industry, was experienced in the construction industry.[2]

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[1] National Safety Council, *Accident Facts* 34 (1990 ed.).

[2] *Id.* at 46-47.

The ruling below seriously erodes the ability of Minnesota, as well as other states and local units of government, to regulate safety at construction sites. The argument advanced by Respondents, and accepted by the Court of Appeals, is that the imposition of a job-site ratio requirement for apprentices interferes with employee training programs conducted by employers and, therefore, is preempted by ERISA. The intrusion supposedly occurs because compliance with the 1:1 and 1:3 ratio requirements adopted by Minnesota would somehow affect, or require changes in, employers' apprentice-training programs, each of which, according to the Court of Appeals, constitutes an "employee welfare benefit plan" under ERISA.

Under this rationale, the ERISA preemption provision could be extended to other forms of state regulation. Requirements that apprentices be supervised by licensed personnel, that they undergo a specified period of training before being eligible for licensure, or that they pass an examination as a condition for licensure could be vulnerable to preemption by reason of the Court of Appeals' holding below.

In particular, a state or other governmental unit could be said to have affected an "employee welfare benefit plan" by prescribing some form of supervision, by mandating some period of training, and by requiring passage of any examination. For example, compelling all apprentices to take an examination, as required in Minnesota and other states, could be said to be even more burdensome than the job-site ratio rule because the subject matter of the examination might affect the content of the courses taught to apprentices in employer-run training programs, which could be considered employee welfare benefit plans under the Eighth Circuit's decision. Further, under the reasoning of the Court of Appeals, an employer may merely establish some form of training program, whether formal or informal, and the employer could be immune from *all* state regulation of apprentices.

In short, the ruling below, if upheld, would not merely prohibit states, like Minnesota and several others, from requiring job-site supervision of apprentices, but it also could be applied to proscribe other aspects of the licensing process. More ominously, the ruling below could portend the nullification of any efforts by states or other units of government to prohibit work by unlicensed individuals on construction projects. Regulations of a state or other jurisdiction that prohibit unlicensed individuals from performing construction work could collide with the ERISA preemption provision because such a prohibition may have much more significant consequences for employee training programs than the less intrusive impact of a job-site ratio requirement. Therefore, the ruling of the Court of Appeals could emasculate all state licensing relating to the construction trades under the rubric of ERISA preemption.

This Court should address the potentially pernicious effect of the ruling below by granting certiorari and clarifying the scope of the ERISA preemption clause as it concerns occupational licensing by states and other units of local government.

B. Intrusion On Federalism

The ruling below also warrants review by this Court because of its impact on the relationship between the federal government and the states. Minnesota and other states have traditionally regulated apprenticeship work in the construction trades. This Court has been solicitous of maintaining a proper balance between federal and state interests in this area, and this concern has been particularly reflected in its treatment of ERISA preemption claims. The interpretation of the preemption clause "must be guided by respect for the separate spheres of governmental authority preserved by our federalist system." *Allessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). *See also Fort Halifax Packing Co. v.*

Coyne, 482 U.S. 1, 19 (1987); *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142, 144 (2d Cir.), *cert. denied*, 110 S. Ct. 57 (1989); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) ("The historic police powers of the states were not to be suppressed by federal acts unless that was the clear and manifest purpose of Congress").

The analysis of the Court of Appeals tramples the principle of federalism and could effectively bar states from regulating any aspect of the employment of apprentices or unlicensed individuals engaged in construction work. Congress has not expressly preempted regulation of apprentices through job-site ratio or other requirements. Therefore, the Minnesota job-site ratio rule does not conflict with any articulated federal policy. Because there is "no prospect of conflict with the federal statute, there is no warrant for disabling [Minnesota] from attempting to address uniquely local social and economic problems." *Fort Halifax*, 482 U.S. at 19. *See also Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) (upholding state statute mandating that minimum health care be provided under insurance policies issued in Massachusetts).[3]

C. Protecting Safety Measures

Safety concerns are central to the Minnesota regulation and other regulations similar to it. High pressure pipefitting is indisputably extremely dangerous work. If the work is not performed properly, individual workers,

[3] Rather than conflicting with federal policy, the job-site ratio rule is consistent with it. Fitzgerald Act, 29 U.S.C. § 50, *et seq.*, authorizes the states to adopt and enforce voluntary apprenticeship programs, including prescribed job-site ratios. While the Act contemplates voluntary subscription to ratios, it reflects a federal policy favorable to the establishment of job-site ratios and the recognition that states should be left free to prescribe precise numerical ratios. The adoption of such ratios under the auspices of the Fitzgerald Act represents an example of cooperative federalism that should not be thwarted by ERISA pre-emption. *Rebaldo v. Cuomo*, 749 F.2d 133, 140 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985).

fellow employees, and the public at large are at risk. As the Court of Appeals itself recognized, "[h]igh-pressure pipefitting is a very dangerous activity; most of the work is not visible when residential or commercial construction is completed, and poor work can cause explosions." *Boise Cascade Corp. v. Peterson*, 939 F.2d 632, 634 (8th Cir. 1991). In fact, there have been a number of industrial accidents attributable to high pressure pipefitting throughout the country in recent years.

The risk that improperly installed equipment could result in a rupture or explosion jeopardizing life and property is a real and legitimate state concern. Job-site ratios, coupled with other regulatory measures, reflect state efforts to assure that minimally-qualified individuals perform this dangerous work. For these reasons, the states and other local units of government rightfully have an interest in enacting regulatory measures to protect the public. Such measures should not be cast aside by an unwarranted finding of preemption under ERISA, absent an express intent by Congress to preempt this traditional area of state regulation. The Court of Appeals, simply stated, has gone too far.

CONCLUSION

For the foregoing reasons, Amicus Curiae Mechanical Contractors Association of America respectfully requests that the Writ of Certiorari be granted.

Respectfully submitted,

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